

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

ORIGINAL
WITH PROOF
OF SERVICE

75-6111

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellee,

-against-

UNIVERSAL MAJOR INDUSTRIES CORP., JAMES G. DUNCAN,
TRANSAMERICAN PETROLEUM CORPORATION, ROY M. HORSEY,
BANNER OIL AND GAS FUNDS, INC., IAN McCARTNEY,
EDWARD G. GEDALECIA,

Defendants,

ARTHUR J. HOMANS,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANT-APPELLANT

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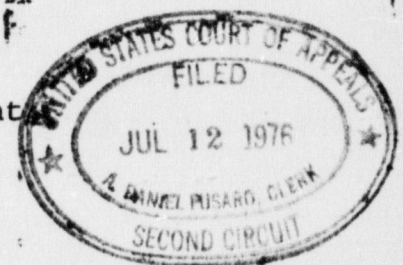


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PROCEDURAL STATEMENT

Defendant Arthur J. Homans ("Homans" or the "defendant") appeals from a final judgment of permanent injunction entered against him on September 2, 1975, enjoining him from violating Section 5 of the Securities Act of 1933 (the "Securities Act"), 15 U.S.C. Sec. 77e. The judgment was based upon an opinion (#42,786) filed on July 14, 1975, in which the district court (S.D.N.Y. Tenney, J.) held the defendant, an attorney, liable for aiding and abetting violations of Section 5 by his client, Universal Major Industries Corp. ("UMI"), through the issuance of letters on Mr. Homans' letterhead to the transfer agent for UMI's common stock which facilitated the transfer of "lettered" and restricted stock by UMI and certain of its officers to various recipients.

The Securities and Exchange Commission ("SEC" or the "Commission") commenced the civil action below seeking preliminary and permanent injunction against eight defendants, including Mr. Homans. The other defendants were: UMI (a Nevada corporation), Transamerican Petroleum Corp., ("Transamerican"), (a California corporation), Banner Oil and Gas Funds, Inc., ("Banner"), (a Maryland corporation), James G. Duncan, ("Duncan"),

Roy M. Horsey ("Horsey"), Ian McCartney ("McCartney"), and Edward Gedalecia ("Gedalecia"), special securities law counsel to UMI. The complaint's first "cause of action" alleged a violation of Sections 5(a) and 5(c) by all eight defendants. Fraud was not involved in that claim. The second "cause of action" alleged a violation by UMI, Duncan, Horsey and McCartney only of the antifraud provisions of the Securities Act. (Sec. 17(a), 15 U.S.C. 77g(a)) and the Securities Exchange Act of 1934 (the "Exchange Act", Sec. 10(b), 15 U.S.C. 78j(b)). The other seven defendants consented to the entry of permanent injunctions against them.

The trial below involved only defendant Homans and only the allegation of "secondary" or aiding and abetting liability. Allegations of "primary" liability through participation in a conspiracy to violate Section 5 were abandoned by the SEC during the proceedings below. The five-day trial commenced as an evidentiary hearing on the SEC's motion for a preliminary injunction on November 13, 1973. It was conducted on widely separated dates, the last of which was July 24, 1974, at which time the court consolidated the hearing with the trial on the merits pursuant to Rule 65(a), F.R. Civ.P.

QUESTIONS PRESENTED

(1) Is secondary, civil liability for aiding and abetting a violation of Section 5(a) of the Securities Act authorized by that statute?

(2) If such liability is created by the Securities Act, must the judgment below be reversed because the legal standard of scienter applied by the district court in its opinion was substantially different from the test subsequently set forth by the Supreme Court in Ernst & Ernst v. Hochfelder, _____ U.S. _____, 96 S.Ct. 1375, 47 L. Ed.2d 668 (1976)?

(3) Was it a clearly erroneous application of controlling principles of equity to the facts set forth in the record for the district court to conclude that there was a reasonable expectation of future securities law violations by Arthur Homans and that a permanent injunction was necessary to prevent such violations?

(4) Was it a clear error of law for the district court to conclude that the requirement of proof by the Commission of a so-called "integrated offering" is limited to cases involving the "intrastate offering" exemption of Section 3(a)(11) of the Securities Act?

THE FACTS

1. UMI, Its Management, and Its Attorneys

UMI is the corporate successor of Universal Major Corp. It became a publicly held corporation in 1954. From 1959 through August 1966, UMI was controlled by Leonard Ashbach, a client and close personal friend of Arthur Homans. Homans was Ashbach's personal attorney and UMI's only attorney from 1959 until August 1966. Until August of 1966, UMI was in the business of selling automotive and electronic products. At that time defendant James Duncan exchanged all of the shares of an oil and gas corporation wholly owned by him for exactly one-half of Ashbach's controlling shares of UMI.

Duncan had his own attorney, a man from Maryland named Thomas F. Johnson. From August 1966 until March of 1967, Ashbach ran one part of the corporate business with Homans as corporate attorney and Duncan ran the part that had originally been his oil and gas business with Johnson as attorney. Officially Homans was General Counsel to UMI.

In March of 1967, as the result of a dispute between Ashbach and Duncan, Ashbach sold his equity in UMI to a group of investors headed by defendant Roy M. Horsey. The "Horsey Group"

thereafter controlled the management of UMI from March 1967 until May 1968, with Mr. Homans as corporate attorney working closely with Horsey. In May of 1968, Duncan became President and took over management control of UMI.

As corporate counsel, Mr. Homans had worked closely and easily with Ashbach and Horsey. His personal relationship with Duncan was more distant, and the working relationship between Homans and Duncan was never close. For example, at the March 22, 1967, board meeting, at which the Horsey Group took over management from Ashbach, Homans and Johnson were asked to serve as co-counsel for the corporation. Also at that meeting a number of resolutions were passed authorizing issuance, for various purposes, of two different convertible debentures and a quantity of common stock. One resolution authorized a private placement of \$3.0 million of 6% convertible debentures. Arthur Homans advised against that action, and the corporation took its advice in connection with it from Johnson. In fact, Homans advised against the issuance of any convertible debentures, even on a private placement basis.

Since Johnson was rendering legal advice to UMI in connection with the proposed "private placement" of 6% debentures, Homans had nothing to do with corporate action in connection

with those securities. However, approximately two months after the March 22 board meeting, Homans learned how many of those debentures had been issued to whom and when. Without deciding that UMI had violated Section 5, Mr. Homans concluded that a potential legal problem was being created. Consequently, on May 26, 1967, Homans submitted a written opinion to Nils Sundling, then President of UMI, advising that the debenture issue be registered immediately with the SEC and that no more be issued pending completion of such registration. That advice was subsequently ignored. Homans rendered no legal services or opinions in connection with the issuance of any UMI debentures, and he was not charged in this action with any violation of law in that connection. Issuance of debentures both before and after his opinion of May 26, 1967, was done entirely without consultation with Mr. Homans, although the first cause of action in the complaint deceptively creates the impression that he participated in such issuance of debentures. It eventually became clear that some members of UMI's management did not appreciate the conservative and correct legal advice Mr. Homans was disposed to give.

On August 24, 1967, the UMI board met in Chicago without inviting Homans to the meeting. Johnson was present as corporate counsel. Horsey was elected Chairman of the Board,

his first UMI office. At that meeting, the board discussed a proposal to give debenture holders an option to take common stock in exchange for interest on the debentures instead of cash, subject to receipt of an opinion of counsel. Homans was not asked to give such an opinion, nor did he do so. Some time between that meeting and mid November of 1967, Homans advised Duncan informally that, in his opinion, the proposed issuance of common stock for debenture interest should not be done unless the shares were first registered with the SEC. Duncan advised the board of the receipt of such advice in a memorandum dated November 17, 1967. (DX-I) at trial). A contrary opinion accepted by UMI management as justifying such stock issuance was subsequently obtained from a New York City attorney named Edward Gedalecia, who was retained as special securities law counsel to UMI in October of 1967. He was subsequently named a defendant in this action. Gedalecia consented to the issuance of a permanent injunction and to a one-year suspension from the practice of law before the SEC soon after being served with the instant complaint.

On September 28, 1967, another UMI board meeting was held with Mr. Homans conspicuously absent. At that meeting, Horsey became President, a man named Ben Zwick became a director and Vice-President, and a resolution was passed authorizing an

increase from \$3 million to \$4 million in the amount of 6% debentures to be issued on a "private placement" basis. Mr. Zwick subsequently recommended that the corporation retain Edward Gedalecia as corporate securities counsel.

Homans first learned that Gedalecia had been retained on October 16, 1967, when Horsey and Duncan so advised him during a telephone conference call. That news came as a surprise to Homans because he had previously been told that he would be retained to register the debentures for a fee separate from his annual retainer. He was now told that Gedalecia had been retained to perform those services and that Gedalecia would thereafter have sole and exclusive responsibility for securities law services to UMI. Homans was told that he would continue, with limited functions not including the area of SEC law, as corporate counsel on an annual retainer basis. He was told that he would be expected to perform services on securities law matters only upon the special request of Gedalecia or a corporate officer and that he should bill for such services, if rendered, on a per diem basis. Obviously, as the result of his having given unwelcome advice in connection with the debentures, Homans was "frozen out" by Duncan from providing anything but specific and strictly limited securities law advice to UMI. When Johnson retired, Gedalecia was quickly hired on the

advice of Zwick. If UMI had followed the advice it received from Mr. Homans, none of the violations of law alleged in the present complaint would have taken place.

On October 26, 1967, at a meeting in New York City, the UMI board passed a resolution formally retaining Gedalecia's law firm as securities counsel and for the specific purpose of immediately filing a registration statement with the SEC. (DX-F). At that meeting the board also authorized the removal of the corporate offices from their former location in Manhattan to the offices of Gedalecia's law firm on Madison Avenue. Thereafter all corporate records were removed to Gedalecia's office, including the minute books previously held by Mr. Homans as corporate counsel. As a consequence of Gedalecia's functioning as securities counsel and the corporate offices being located in his law offices, Gedalecia conferred frequently and closely with UMI's management on securities matters during the months and years that followed. Homans, on the other hand, was not consulted and did not advise UMI on securities law matters after Gedalecia was retained. He was retained at one point by Banner Oil, a UMI subsidiary, to register three issues of oil and gas interests, tasks which were completed promptly and without the creation of legal

problems of any kind.

Gedalecia did not file a UMI debenture registration statement promptly as he was retained to do in October of 1967. Nearly three and one-half years later, in March of 1971, Gedalecia filed a registration statement covering 1,921,000 shares of UMI common stock. The relationship between UMI and Gedalecia was terminated in August 1971, and an attorney named Emanuel Fields was retained in his place as securities counsel for UMI. Fields was not named a defendant in this action. In September 1971, Fields filed an amendment to the registration statement. Gedalecia replaced Fields in April and May of 1972. After that UMI had no securities counsel. In July of 1972, the UMI registration filing was withdrawn at the company's request. (T479, PX 2). The registration never became effective.

Except for the Banner Oil registration, Mr. Homans was retained by UMI on an annual retainer basis to perform legal services on non-securities matters from October 1967, until July of 1972, when he resigned. He was retained again in November 1972 and ended his relationship with UMI completely on January 15, 1973, a date now more than three and one-half years in the past.

2. The UMI Securities Transactions Covered by the Complaint

Only the "First Cause of Action" alleging violations of Section 5 is relevant to Mr. Homans. That claim involves alleged violations in connection with transfers of UMI's common stock. No violations were alleged, for example, with respect to issuance of any UMI debentures.

According to unquestioned and un rebutted testimony by Mr. Homans and exhibits prepared by him (DXX---J & N), until after September 1, 1968, there were no transfers to persons other than persons who Homans personally knew to be corporate "insiders" (i.e., officers, directors, accountants, and family members or close associates of same). In other words, no transfer giving rise to even the possibility of any Section 5 violations took place until at least eleven months after Gedalecia was retained and Mr. Homans had ceased to be securities counsel for UMI. In fact, the only transfers which the SEC undertook to establish at trial as having been made to members of the "public" and not to bona fide corporate "insiders" were made in 1971, one of 5,000 shares to Faust Nardone on January 4, 1971, and the other of 1,500 shares to George Andersen on July 22, 1971. At that time, Gedalecia had been securities law counsel for over three years.

After the board meeting of March 22, 1967, described

above, UMI's capital structure consisted of the following: 7% convertible debentures, 6% convertible debentures, and common stock. The 7% debentures were issued in the face amount of \$440,000 to 26 transferees. The 6% debentures were issued between April 1967 and December of 1968 to approximately 425 transferees. Homans knew nothing about issuance of any of the 6% bonds, as described above, until May of 1967, at which time he advised UMI in writing to cease issuance of those bonds completely until the entire authorized issue was registered with the SEC. After that, Homans rendered no further services in connection with those bonds and was given no further information about them.

The securities transactions in violation of Section 5 which Homans was alleged to have aided and abetted took place over a period of approximately seven years, from March 1967 through February of 1973. They included a variety of transfers by a number of different parties, for a number of different purposes and for different kinds of consideration. They included:

- (a) issuance of stock by UMI upon conversion of the 6% and 7% bonds;
- (b) issuance of stock by UMI for interest on the 6% and 7% debentures;
- (c) issuance of stock by UMI in exchange for cash;
- (d) issuance of stock by UMI in exchange for oil and gas interests;
- (e) issuance of stock by UMI in exchange for services rendered

by the corporate accountants and business consultants; (f) transfers of stock by Horsey for unknown purposes and for unknown consideration; (g) transfers of stock by Duncan for unknown purposes and consideration; (h) transfers of stock by Transamerican (a corporation wholly-owned by Duncan) for unknown purposes and consideration.

The SEC made no attempt in its trial proof to "integrate" any of those eight different transfer categories into one or more coherent and coordinated "offerings" as that term is used as a term of art in the Securities Act (e.g., Sec.4(2)) and in the securities business. In his uncontroverted trial testimony, Mr. Homans testified (a) that by far the vast majority of the transferees who received UMI common stock were personally known to him as corporate "insiders" (officers, directors, accountants, attorneys, or family members and close associates of same), (b) that he did not know when the transfers were being made that any had been made to transferees who were not bona fide "insiders", (c) that he had been advised by UMI management and believed that each of the stock transfers was made (i) to an "insider" and (ii) on the basis of a separately-negotiated and distinct transaction in each case, (d) that he did not learn until after this action was begun that some transfers had been made to persons who were not bona fide insiders, and (e) that,

to his knowledge, none of the stock transfers involved in this action was made as part of an "integrated offering" involving a plan to distribute shares over a limited period of time for a common price and for the same purpose.

Consequently, Mr. Homans argues (Point IV below) that (a) Section 5 requires registration of integrated "public offerings", not isolated and separately negotiated transactions and (b) the SEC simply failed at trial to prove that there was an integrated "offering" by anyone that he "aided and abetted". He also maintains that the district court made a clear error of law in concluding that the concept of an "integrated offering" is limited in its application to cases involving the so-called "intrastate offering" exemption.

3. The Homans Letters.

In its complaint, the SEC alleged that the unlawful "aiding and abetting" of Section 5 violations charged against him involved 206 letters written by Homans on his office letter-head as an attorney to the transfer agent for UMI's common stock. In those letters, Mr. Homans, who was known to the transfer agent as UMI's attorney, asked the transfer agent to issue restricted and "lettered" stock to transferees designated in attached instructions from the company. The detailed contents of the letters are described in pages 11 to 14 of Judge Tenney's

opinion below. Homans knew that the transfer agent would not transfer even restricted-transfer or "lettered" stock except upon receipt of instructions from the corporation accompanied by an "opinion" from an attorney for the corporation.

The letters by Homans relied upon by the SEC fall into two general categories: "Form 1" and "Form 2". The SEC argued and the court concluded below that both forms were in fact (and were regarded by the transfer agent as containing) legal opinions by Homans to the effect that the requested transfers would not be in violation of law. Mr. Homans maintains (a) that the Form 1 letters contained no legal opinion by him, but merely transmitted an attached legal opinion by Gedalecia and stated that Homans was "relying upon" the Gedalecia opinion in requesting that the subject stock transfers be made and (b) that the Form 2 letters did, on their face, contain a legal opinion by Homans, but (i) in rendering that opinion he was relying upon Gedalecia and Duncan to restrict "private transaction" transfers submitted to him to bona fide "insiders" (as Homans had limited such transfers before Gedalecia had taken over as securities counsel) and (ii) the transactions covered by the Form 2 letters were sufficiently infrequent and spread over such a long period of time (6 years) that it was

not unreasonable, negligent or professionally reckless of him to conclude that those transactions were isolated and individually negotiated "private transactions" (as the company stated to Homans they were) and not part of an integrated "public offering" or more than one such offering.

Each of the Form 1 letters had attached to it an opinion letter signed by Gedalecia and stated expressly in its text that "the undersigned renders no opinion ***, but I rely on the opinion of ***(Gedalecia) to the effect that ***(the transfer) does not constitute a violation of the Securities Act". The court below wondered in its opinion what the nature of the stated "reliance" was if it was not for a derivative opinion by Mr. Homans himself. The court's observation was in direct contradiction of the clear language of the Form 1 letter to the effect that Mr. Homans rendered "no opinion". The simple answer is that Mr. Homans was relying on Gedalecia's opinion in passing on the company's request for transfer to the transfer agent, since he knew that an opinion had to be submitted if the transfers were to be made. Mr. Homans' position is that, when he stated that he rendered no opinion, his statement meant precisely what it said, and if the transfer agent required an opinion from him instead of Gedalecia it should have returned the letter and asked for what it wanted.

The district court found (opinion, footnote 9) that between May of 1968 and June of 1971, letters from Homans to the transfer agent covered 1,383,658 shares in 751 transfers to a number of transferees that could not be determined because the "transferees" listed in PX-1 included an undetermined number of duplications. All of the Form 1 letters covered transfers made in connection with the UMI debentures, either for issuance of shares upon conversion or for issuance of shares in lieu of debenture interest.

Based upon Mr. Homans' undisputed testimony, the SEC included, quite deceptively, in the overall transfer figures presented to the court at trial transfers to 43 transferees covering some 1,106,050 shares between the March 22, 1967 board meeting and July of 1968, which clearly involved nothing more than the transfer of Leonard Ashbach's equity interest to the "Horse Group" and the subsequent reallocation of shares among the various "insider" members of the "Horse Group" of controlling shareholders, who became officers and directors of UMI.

When attention is directed to the Form 2 letters, it becomes evident that the number of transfers over a six year period in no way approximates the exaggerated figures presented in gross by the SEC to the district court. According to Mr. Homans' uncontroverted testimony, Form 2 letters involved only about

80 transferees who were not bona fide corporate "insiders" scattered over a period of six years between March 21, 1967, and December 8, 1972, or an average of fewer than 14 such transferees and still fewer transactions per year (DX-N). According to Mr. Homans, there were no non-insider transferees in 1967 or 1968, 24 such transferees in 1969, 34 in 1970, 19 in 1971, and 1 in 1972 (DX-N). At the time the transactions were submitted by UMI's management to Homans for transmittal to the transfer agent, Homans was advised that each of those transactions was a "private transaction" and to a bona fide "insider" transferee.

It was not until he conducted a detailed investigation in preparation for trial of this action that Mr. Homans learned that some 80 questionable "non-insider" transferees had been mixed in with 175 bona fide corporate insiders actually known to him among the Form 2 transfers that he issued letters for over a six year period. The inclusion of such transferees was completely contrary to advice which Homans had given to Horsey, Sundling and Duncan concerning "private" transactions before Gedalecia was retained in October of 1967. Homans' advice was in fact followed by UMI's management for at least one year after Gedaleica replaced Homans as UMI's securities law attorney. Then, some time in late 1968 or 1969, non-insiders were included, without his knowledge, in the transactions which

were presented to him as having involved "insiders" closely associated with UMI's officers and directors.

In its opinion (pp.15-16) the district court found that Mr. Homans wrote 118 Form 1 letters and 88 Form 2 letters. That opinion accurately describes (pp.16-18) the procedure used by Mr. Homans in issuing the letters, as described in his unrefuted testimony. That description need not be repeated here.

POINT I

SECONDARY, CIVIL LIABILITY FOR AIDING AND
ABETTING A VIOLATION THEREOF IS NOT
AUTHORIZED OR IMPLIED BY EITHER THE LANGUAGE
OR THE LEGISLATIVE HISTORY OF SECTION 5
OF THE SECURITIES ACT UNDER THE METHOD OF
ANALYSIS EMPLOYED BY THE SUPREME COURT IN
ERNST & ERNST V. HOCHFELDER.

When the kind of strict construction and meticulous analysis employed by the Supreme Court in Ernst & Ernst v. Hochfelder, _____ U.S. _____, 47 L. Ed. 2d 668, 96 S. Ct. 1375 (3-30-76), CCH Fed. Sec. L. Rep. Par. 95,479, is applied to the pertinent language of Section 5, to its legislative history, and to the federal securities laws generally, it becomes evident that secondary, civil liability for aiding and abetting a violation of the statute by so-called "primary" violators is not authorized or implied. Consequently, there is no statutory or congressional authority for the theory of liability upon which the Commission's action against Mr. Homans and the opinion and judgment of the court below were based.

There is no Supreme Court authority for so-called secondary, civil liability for "aiding and abetting" a violation by others of Section 5 or any other provision of the federal securities laws, and no such authority is cited in the opinion

below. In footnote 7 to its opinion in Ernst, supra, the Supreme Court expressly left open and undecided the question whether "civil liability for aiding and abetting is appropriate" under Section 10(b) and Rule 10b-5, thus indicating clearly that doubt exists among the justices of the Court as to whether or not the translation by certain lower federal courts of aiding and abetting liability from the criminal to the civil side of liability under the securities laws is justified by the text of the pertinent provision when subject to the kind of searching and restrictive analysis employed by Justice Powell in Ernst itself.

We respectfully present to this Court for its most serious consideration the question thus raised by the Supreme Court. We submit that, upon careful analysis, following the approach taken by the Supreme Court in Ernst, and abjuring the broad, remedial construction urged by the Commission and rejected by the Court in that case, Section 5 does not create or authorize the federal courts to create secondary, civil liability for aiding and abetting such as the district court imposed upon Arthur Homans in this case. The existence of aiding and abetting

liability in the context of a criminal prosecution under the securities laws has a completely different history and rationale that is not presented and need not be considered here.

It is particularly significant that in Ernst the Supreme Court elected to ground its holding of reversal expressly upon a rationale applicable to primary violations of Section 10(b) and to leave open the question of the viability of a secondary liability claim on any rationale when the Seventh Circuit had expressly based its decision below on aiding and abetting grounds, and the proceeding before the Supreme Court did not involve any question of primary liability at all on the part of Ernst & Ernst. In other words, the Supreme Court went far out of its way to eliminate primary, civil liability under 10(b) on any theory of pure negligence and to avoid in the process giving any support to the existence of a civil aiding and abetting claim, even one based upon "intent to deceive, manipulate or defraud". Ernst, supra, n. 7.

Thus it is clear under the holding of Ernst (1) that a secondary aiding and abetting claim cannot be based upon any theory of negligence such as that upheld by this Court

in S.E.C. v. Spectrum, Ltd., 489 F. 2d, 535 (2d Cir. 1973), and S.E.C. v. Management Dynamics, Inc., 515 F. 2d, 881, (2d Cir. 1975), (2) that the holdings of those cases must be overruled by this Court (see Point II, infra), (3) that because and to the extent that the decision below was based upon those now undermined decisions it must be reversed, and (4) that this Court must consider as open questions under Section 5 the questions regarding aiding and abetting liability so carefully created and emphasized by the Supreme Court in Ernst, i.e., "whether civil liability for aiding and abetting is appropriate under the section . . . and the elements necessary to establish such a cause of action;" if it exists.

In light of the Supreme Court's express holding in Ernst that not even primary liability on the part of conscious conspirators or joint tortfeasors can be established under Section 10(b) and Rule 10b-5 except upon a showing of "intent to deceive, manipulate or defraud", it becomes extremely significant that in the present case Arthur Homans was not named in the fraud claim of the Commission's civil complaint or charged in any way with participating in or aiding any fraud

or deception perpetrated by any of the other defendants. Thus no scienter in that sense, required under 10(b) in Ernst, was alleged against Mr. Homans in the present case.

Mr. Homans was held liable below for aiding and abetting violations of Section 5(a)(1) of the Securities Act by rendering legal opinions which he either knew or should have known to be unfounded in fact or incorrect in law if he had applied appropriate legal standards of care to investigating the relevant facts and researching the relevant law prior to writing those opinions. The acts complained of by him were done exclusively in his capacity as an outside attorney for UMI and not as special securities law counsel. That title and responsibility were expressly delegated by the corporate client exclusively to Edward Gedalecia. Mr. Homans was corporate counsel to UMI. He was not charged with or paid by the corporation for advising it on any of the securities transactions involved in the trial below.

Section 5(a)(1) makes it unlawful, "unless a registration statement is in effect as to a security" or an exempted security or exempted transaction is involved under

Section 3 or Section 4, "for any person, directly or indirectly - (1) to make use of . . . interstate commerce or of the mails to sell such security" There is no S.E.C. rule under Section 5(a) corresponding to Rule 10b-5 under Section 10(b) of the Exchange Act.

Section 5 differs from Section 10(b) of the Exchange Act and Section 17 of the Securities Act in that they are so-called "fraud" statutes, whereas Section 5 is a "strict liability" statute in the sense that a violation may exist without any element of fraud or deception being involved.

Perhaps because of its "strict liability" character, Section 5(a) is quite straightforward about the conduct it makes unlawful. It is unlawful under that Section to use interstate commerce or the mails "directly or indirectly" to "sell" a security unless an exemption under Section 3 or Section 4 is applicable.

On its face, Section 5(a) makes it unlawful only to "sell" securities, "directly or indirectly," in the absence of an effective registration statement or an applicable

exemption. This would appear to strictly prohibit selling and conspiracies to sell where registration is required, or what Professor Ruder refers to as "primary" violations in his article cited in Note 7 to the Ernst opinion, Ruder, "Multiple Defendants in Securities Fraud Cases: Aiding and Abetting, Conspiracy, in Pari Delicto, Indemnification and Contribution", 120 U. Pa. L.Rev. 597 (1972).

While one must assume or infer that the criminal liability aspects of Section 5 were intended to encompass "aiding and abetting" liability on the theory that such ancillary criminal liability was well recognized in the criminal law when the Securities Act was passed in 1933* no such inference or assumption is justified with respect to civil aiding and abetting liability, since such liability was unknown to the law in 1933. It is purely a creature of judicial action, and in Ernst, the Supreme Court cites no Circuit Court authority for its existence earlier than 1969. Brennan v. Midwestern United Life Ins. Co., 259 F. Supp. 673 (1966), 286 F. Supp. 702 (N.D. Ind. 1968), aff'd, 417 F. 2d, 147 (7th Cir. 1969), cert. denied, 397 U.S. 989 (1970).

*
CF. 18 U.S.C. Sec. 2 (1970)

Of course the precedent in Brennan was created by the same Circuit Court whose broad interpretation of Section 10(b) to include negligence liability was rejected in Ernst itself.

The conclusion that Section 5(a) was intended to create civil primary liability for selling, but not civil secondary liability for aiding and abetting is supported by the legislative history. The House Report states the pertinent meaning of Section 5 to be that: "subject to the exemptions allowed by Sections 3 and 4, it is made unlawful for any person . . . to sell any security" H. Rep. 5480, 73rd Cong., 1st Sess., 19 (1933). When Sec. 5(a)(1) was amended in 1954, the legislative intent was still limited by the language of Congress to primary liability for "selling" unregistered securities. "The term 'sell' in Section 2(3) of the Act . . . is redefined to separate 'offer' from 'sale' with the result that Section 5(a)(1). . . continues to make unlawful sales, contracts of sale or contracts to sell prior to the effective date of the registration statement but permits offers during the waiting period". S. Rep. No. 1036, 83rd Cong. 2d Sess. 5 (1954).

Surely, if Congress had wished in Section 5(a) to make unlawful not only "selling" but also aiding or assisting an unlawful sale, it would have said so. Congress obviously knew how to use appropriate language if that had been its purpose. No aid or assisting language was included in the statute and none was read into it in a civil context until approximately 40 years after the statute was enacted. In the area of civil liability, unlike the federal criminal law, there is no statute expressly imposing liability for aiding and abetting. 18 U.S.C. Sec. 2. Moreover, it would seem self-evident that legislative authority for civil aiding and abetting liability under the securities laws must be found in those laws and not in the criminal aiding and abetting statute.

Where an attorney or accountant is an officer, a director, or otherwise actively involved with an issuer, underwriter or dealer as a primary participant in illicit securities sales under Section 5(a), the law of conspiracy is more than adequate to impose primary liability upon him. And it was adequate for that purpose in 1933, as was (and is) the civil law with respect to joint tortfeasors.

What Section 5 does not encompass and Congress did not intend, either by direct language or by necessary

implication from the words used, is so-called "secondary" liability imposed upon professional advisors such as attorneys or accountants who did not sell or actively conspire to sell unregistered securities but who participated in some peripheral way based upon limited knowledge of the facts (which may have been concealed or withheld from them) and thus fell within the broad sweep of the Commission's vague definition of "aiding and abetting".

It may make sense and comport with the intent of Congress to interpret the statutory exemptions provided in Sections 3 and 4 narrowly against a civil defendant clearly contemplated by the statute in Section 5, i.e., the corporate issuer, an underwriter or a dealer. But it makes no sense and conflicts directly with the language and character of Section 5 for its "strict liability" provisions to be applied by judicial fiat to ever widening circles of civil defendants never contemplated by Congress when the statute was passed nor imagined by the Commission for some forty years thereafter.

Similarly, the broad, remedial purposes of the statute contemplated by Congress could (and have) been relied upon under tort law principles established long before 1933 to grant protection to civil plaintiffs other than the Commission

for whose protection the legislation was patently created. But the same rationale does not apply to the creation of an ever expanding universe of new and hitherto un contemplated defendants. The history of civil damage actions under Section 10(b) has demonstrated that it can be quite difficult to determine and define the class of persons Congress intended to protect by enacting a piece of criminal legislation. It is clear that in the 1933 and 1934 Acts, Congress was trying to protect investors in buying and selling securities and in casting proxy votes. Even so, the problems concerning which security holders are permitted to bring damage and injunction suits have been many and varied. The difficulties involved in adding category after category of new civil defendants would undoubtedly be even more troublesome. Once judicial contemplation passes beyond the prospective defendant law violators clearly indicated in the statute (issuers, underwriters, dealers, officers and co-conspirators) the statutory thrust and legislative intent become extremely murky, too murky for confident judicial action within the given statutory framework.

Moreover, the inclusion of secondary "aiders and abettors" within the ambit of Commission injunction suits is clearly not necessary to accomplish the remedial purposes

contemplated by Congress and incorporated in Section 20(b) of the Securities Act.

The Commission is authorized to "bring an action in any district court" to enjoin "any person /who/ is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this title, or of any rule or regulation prescribed under authority thereof. . . ." If the unlawful "act or practice" is the sale of unregistered shares where registration is required by law, the statutory purpose can be clearly, effectively and completely served by enjoining all persons (corporate and individual) primarily involved in the prohibited "sale" --- those who have the securities to sell and are selling or trying to sell them, i.e., the issuer, underwriters, dealers, officers and employees of any of them and any other co-conspirators or joint tortfeasors.

In the present action, for example, the unlawful acts complained of by the Commission could have been (and were) completely stopped and permanently ended without an injunction being issued against attorney Homans on an "aiding and abetting theory". Mr. Homans was apparently named a defendant here because of a mistaken belief on the part of the Commission's regional staff that it is the legal duty of an attorney for a

corporation with publicly held securities to "insure" or guarantee compliance by his client with the securities laws." *

In the present case, the record is uncontroverted that Mr. Homans advised his corporate client, UMI, and its operative officials correctly on the law and the proper course of action for them to take. ** None of the transactions sued upon in the claim against Homans took place until eleven months after October 26, 1967, when Edward Gedalecia replaced Homans as securities law counsel for UMI and Homans was told to render no securities law services and to submit no bills for such services unless expressly asked to do so. If the advice Homans concededly gave to UMI had been followed, none of the unlawful transactions alleged in this case would have taken place.

* SEC main brief below dated 8/23/74, p.8. (R. Doc. No. 26)

**When he learned they had been issued without his knowledge, he advised that such sales cease immediately and that registration be effected promptly (A-85-87) (DX-H) He advised against issuance of UMI stock on conversion of the unregistered debentures or in lieu of interest on the debentures. (A-86). He refused to issue an opinion on either subject. He advised UMI to take no action unless an opinion could be obtained from another attorney experienced in securities law matters. When such an opinion was obtained, he expressed no opinion on its accuracy. During the entire period from 1959 to October 26, 1967, when Homans was in charge of securities law matters for UMI, no transactions occurred involving any question of illegality under any provision of the securities laws. Based upon uncontroverted

Congress clearly did not contemplate in either Section 5 or Section 20 of the Securities Act creating so-called "secondary liability" for the purpose of making a peripheral and secondary legal advisor like Arthur Homans in this case a defendant in an injunction suit on a theory of civil "aiding and abetting".

(** Footnote continued)

testimony by Homans in no way rejected by the district court, no securities transactions of questionable legality and involved in the allegations against Homans took place until eighteen months after Edward Gedalecia was retained as securities law counsel for UMI in October of 1967. Judge Tenney questioned, but did not reject, Homans' uncontroverted testimony that on October 27, 1967, Gedalecia was delegated by UMI's President with exclusive authority over securities law advice to the corporation and given complete custody and control of all of the company's corporate records for that purpose. Homans was expressly advised by UMI to give no advice and to render no services on securities law matters unless requested to do so. In short, while Homans was in charge of the legal aspect of UMI's securities transactions and for 18 months after Gedalecia took charge of those matters, no significant securities law problems arose. All of the transactions involved in the claim against Homans took place 18 months and more after Gedalecia became securities law counsel and at a time when Gedalecia was primarily responsible for advising UMI on the meaning of the securities law. During the entire period involved in the transactions sued upon, Homans' responsibility for securities law advice to UMI was secondary to that of Gedalecia and completely uncompensated.

POINT II

THE SUPREME COURT'S REASONING IN ERNST & ERNST V. HOCHFELDER REQUIRES THIS COURT TO OVERRULE THE HOLDINGS OF S.E.C. V. SPECTRUM AND S.E.C. V. MANAGEMENT DYNAMICS, INC., AND TO SUBSTITUTE A MORE STRINGENT REQUIREMENT OF SCIENTER FOR THE NEGLIGENCE CONCEPT UPHELD IN THOSE CASES. BECAUSE THE DECISION BELOW WAS BASED UPON THE MORE LENIENT STANDARDS OF SPECTRUM AND MANAGEMENT DYNAMICS, IT MUST BE REVERSED.

If the concept of civil aiding and abetting liability is not eliminated entirely for the reasons set forth above, then the holdings of Spectrum and Management Dynamics must be overruled and rewritten to conform to the Supreme Court's holding in Ernst.

The decision below took its controlling principles of law with respect to civil liability for "aiding and abetting" securities law violations from the decisions of this Court in S.E.C. v. Spectrum, Ltd., supra, and S.E.C. v. Management Dynamics, Inc., supra. In Spectrum this Court adopted a "negligence standard" for determining the liability of an attorney as an aider and abettor of securities law violations through the rendering of exemption opinions. In Management Dynamics this Court explained that the "negligence standard" of Spectrum requires proof of a "high degree of carelessness" and not

ordinary negligence.

The reasoning of the Supreme Court in the recent case of Ernst & Ernst v. Hochfelder, supra, an aiding and abetting case against a firm of accountants under Section 10(b), requires this Court to overrule the "negligence" concepts of its two earlier decisions and to substitute for those concepts a more stringent requirement of scienter consistent with the opinion in Ernst, i.e., a requirement of intent to participate in a violation of federal law.

Because the court below applied the now incorrect principles of Spectrum and Management Dynamics instead of the correct and more difficult requirements of Ernst, and further relied upon secondary rather than primary liability, the decision below must be reversed.

It might be argued that Ernst was sufficiently different on its facts from the present case to make its rationale inapplicable to the present situation. No material difference exists between the two cases.

The fact that the plaintiff in Ernst was a private plaintiff whereas the SEC is the present plaintiff

should make no difference in the legal test applicable to the issue of civil liability, although the role of the SEC as plaintiff representing the "public interest" might have some relevance to the question of the remedy to be granted. That is, with liability established under the proper standard, it might be proper for the district court to grant an injunction against future violations upon a lesser showing of proof by the Commission than might be required of a private party to obtain similar relief. S.E.C. v. Manor Nursing Centers, Inc., 458 F. 2d, 1082, 1100 (2d Cir. 1972); S.E.C. v. Management Dynamics, supra.

Similarly, the fact that in Ernst the plaintiff sought monetary damages whereas here the Commission sought an injunction against the defendants is a matter of remedy only, unrelated by logic or law to the question of liability, i.e., what must be established to prove a violation of law. See Ernst, supra, n. 12, referring to S.E.C. v. Capital Gains Research Bureau, Inc., 375 U.S. 180 (1963).

In Ernst the Supreme Court expressly rejected a series of arguments presented by the S.E.C. as amicus curiae

Among the propositions thus rejected was the contention that a lenient "negligence" standard rather than a strict "intent" test was required to effectuate the "remedial purposes" of the Exchange Act in general and of Section 10(b) in particular.

POINT III

THE RECORD IS COMPLETELY DEVOID OF EVIDENCE
INDICATING THAT DEFENDANT HOMANS COULD
REASONABLY BE EXPECTED TO COMMIT FUTURE
VIOLATIONS OF THE SECURITIES LAWS. IT WAS
THEREFORE CLEARLY ERRONEOUS AND ABUSIVE
OF THE DISTRICT COURT'S DISCRETION FOR A
PERMANENT INJUNCTION TO BE ENTERED AGAINST
THIS DEFENDANT.

Issuance by a federal district court in an action by the Commission of an injunction against future violations of the securities laws is a drastic remedy not to be issued except upon a proper showing of necessity. S.E.C. v. Franklin Atlas Corp. 171 F. Supp. 711 (S.D. N.Y., 1959, Dawson, J.) The only proper purpose of such injunctive relief is to deter. The purpose of punishment is not proper or permissible. S.E.C. v. Graye, 156 F. Supp. 544, 545 (S.D. N.Y., 1957, Kaufman, J.) In deciding whether or not to grant an injunction, the district court is "subject to principles of equitable discretion." Hecht Co. v. Bowles, 321 U.S. 321, 327 (1944) ("The historic injunctive process was designed to deter, not to punish. The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mold each decree to the necessities of the particular case." 321 U.S. at 329).

In the absence of substantial evidence indicating the existence of a "reasonable expectation of future violations" by the defendant, a permanent injunction is not justified and cannot properly be issued consistent with controlling equitable principles.

Hecht v. Bowles, supra; S.E.C. v. Franklin Atlas Corp., supra;
S.E.C. v. Culpepper, 270 F. 2d 241, 250 (2d Cir. 1959); S.E.C. v.
Koracorp Industries, Inc., _____ F. Supp. _____ (N.D. Calif., 3-26-76),
CCH Fed. Sec. L. Rep. Par. 95,532. "The moving party must satisfy
the court that relief is needed. The necessary determination is
that there exists some cognizable danger of recurrent violation,
something more than . . . /a/ mere possibility" U.S. v. W.T.
Grant Co., 345 U.S. 629, 633 (1953).

In the present case there was absolutely no basis in the
record for a finding or conclusion by the district court that there
existed, when the decision was rendered, a reasonable expectation
of future securities law violations by Mr. Homans. There was no
"cognizable danger of recurrent violation" under any reasonable
reading of the record before the district court. Indeed, the
Commission did not even argue that Mr. Homans was likely to
commit any further violations in the future. It merely maintained
that since Mr. Homans had a few clients that were "public corpora-
tions", he might possibly be in a position to commit statutory
violations at some future time. In its opinion below the district
court erroneously accepted that argument.

The mere existence of an "opportunity" for or "possibility"
of future violations is not enough. The evidence must indicate
a likelihood. It was clearly erroneous for the district court

to base its conclusion that Mr. Homans was reasonably likely to commit future violations upon his stated "intention of continuing in the practice of securities law."

Judge Tenney's opinion was dated July 11, 1975. Mr. Homans ceased to represent defendant UMI on January 15, 1973, more than two and one-half years earlier. In his trial
*
testimony and affidavits, Mr. Homans had described to the court and to the Commission the circumstances surrounding every securities law opinion he had written since the action was commenced. When the Commission submitted its proposed judgment of permanent injunction to Judge Tenney for entry, Mr. Homans brought his earlier statements concerning his practice of
**
securities law up to date. Thus the Commission staff knew at that time exactly what Mr. Homans' securities law practice had consisted of for a period of some three years before it asked the district court to enter a permanent injunction. And it knew that there was no significant possibility of future securities law violations by Mr. Homans.

Moreover, Mr. Homans offered to the district court a proposed judgment more specific and less all-encompassing than the Commission's standard form of injunction that simply tracks the statutory language and prohibits any conceivable future

* Tr. 237-242

** A. -187-193, 200-215

violations. He proposed, among other things, (a) that the order have a time limit for self-expiration and (b) that it require him, for a specific period of time, to submit all securities law opinions rendered by him to an attorney acceptable to the S.E.C. for review, to adopt certain specific office procedures, and to make his records fully available to the Commission staff for review during the period of the order. Surely if those or similar provisions had been incorporated in the court's judgment (instead of the undeterminate and broad-guage injunction proposed by the Commission) even the possibility of future violations by Homans would have been eliminated for all practical purposes. The Commission's unwillingness to accept a limited final order along the lines proposed by Mr. Homans reflects a purpose to punish him and not merely to protect the investing public from violations of federal law.

Indeed, the behavior of the Commission staff toward Mr. Homans during the entire period involved in this suit (beginning with the commencement of its investigation of UMI) has indicated clearly that there is, in reality, not the slightest apprehension or concern on the part of the S.E.C. attorneys familiar with this action that he would be likely to be involved in any other securities law violations. Those attorneys have all known Mr. Homans for a number of years.

They have never indicated even a casual interest in how Mr. Homans has conducted his securities law practice for clients other than UMI. He was never involved in an S.E.C. investigation of any client other than UMI.

This is in sharp contrast to the facts in Spectrum with reference to the attorney involved therein which no doubt influenced the court in its reversal of Judge Tenney's denial of an injunction in that case. In the course of that appeal the S.E.C. had disclosed to the Circuit Court that the attorney in question had been enjoined for violations of the securities laws on two separate occasions and had pleaded guilty to a third such violation.

Based upon the disclosures he had made voluntarily, it is perfectly obvious from the limited nature of Mr. Homans' securities law practice over the last twenty years for clients other than UMI that it is hardly even possible for him to violate the securities laws, let alone likely or probable that he will do so.

It has now been more than three and one-half years since Mr. Homans ceased to represent UMI. During all that time, the S.E.C. has not expressed even a suspicion that Mr. Homans might be engaged in securities law violations. He has

offered, voluntarily, to submit his securities practice to S.E.C. or peer review for a period of two years more, if the Commission or the court wishes him to do so. The circumstances of this case clearly do not involve any significant possibility of future violations by Arthur Homans.

As the court stated in Koracorp, supra, in granting summary judgment for the defendants on the ground that the record (while indicating past statutory violations) did not demonstrate a reasonable expectation of future violations:

"Despite S.E.C. arguments to the contrary, what it seeks is more than a mere prophylactic related to the specific facts of the case. The broad, all-encompassing injunction sought here...carries the strong inference that the court believes the defendants would violate the law but for the court's intercession...."
(underlining in original)

We submit that no one familiar with the facts of this case either does or reasonably could believe that a permanent injunction was necessary here to prevent future securities law violations by Arthur J. Homans. In the absence of a reasonable basis in the record for such a belief, the action should have been dismissed, as it was in the Koracorp case, supra.

POINT IV

IT WAS A CLEAR ERROR OF LAW FOR THE
DISTRICT COURT TO CONCLUDE THAT THE
REQUIREMENT OF PROOF OF A SO-CALLED
"INTEGRATED OFFERING" IS LIMITED
TO CASES INVOLVING THE "INTRASTATE
OFFERING" EXEMPTION OF SECTION 3(a)(11).

One of the main arguments made on behalf of Mr. Homans below was that the S.E.C. had the burden of proving not only that sales of UMI stock covered by Homans' opinions were made to members of the "public" as defined in S.E.C. v. Ralston Purina Co., 346 U.S. 119 (1953), but also that such sales were made as part of a single, definable, and integrated "offering" of securities and not as a series of separate, isolated, and individually-negotiated transactions over a period of six years - - - as he had been advised and testified the facts to be.

Section 4(2) exempts from the registration requirement of Section 5 transactions "not involving any public offering." Mr. Homans' argument was that although an "issuer" may, under the holding of Ralston Purina, have the burden in an appropriate case of proving the availability of the Section 4(2) exemption, the Commission, according to its own regulations, has the burden of establishing that the securities sales alleged to have been in violation of Section 5 were part of an "integrated

offering" that was required to be registered under the act and not activities beyond the coverage of the statute.

Because of constitutional considerations arising from the "commerce clause", purely intrastate securities offerings are beyond the statutory authority of Congress to regulate, and for that reason the "intrastate exemption" of Section 3(a)(11) was incorporated in the statute. Also beyond the intended coverage of Section 5 as insignificant are single, isolated transactions not part of an integrated "offering" of significant size. The term "offering" is a term of art in the securities business recognized by Congress in the words "public offering" of Section 4(2). In certain circumstances, it is synonymous with the term "issue".

Reading Section 5 and Section 4(2) together, a number of things are clear. The statute is meant to cover "offerings" or "issues" and not mere isolated securities transactions. It is also meant to cover "public offerings" but not "nonpublic offerings".

In other words, in order to establish a Section 5 violation, the Commission must first prove that an "offering" covered by the statute was made. Once it has done so (at least in cases like Ralston Purina where the defendant is the issuer), the burden shifts to the defendant to prove the availability

of an exemption, e.g., that the issue or offering was "not a public offering" within the meaning of Section 4(2).

In the present case, the securities transactions covered by Mr. Homans' letters took place over an extremely long period of time (over 6 years) and involved a wide variety of different circumstances. In some transactions the shares were issued by the corporation, UMI, for money. In others they were issued in barter for oil properties held by a third party. In still others they were issued in lieu of interest payments on corporate bonds. In others they were not issued by the corporation at all, but were sold by one or another of the officer-stockholders to someone they happened to know or meet. In some cases stock was issued in barter for services to corporate accountants and consultants. In others it was given by corporate officers as gifts.

These various transactions were submitted to Mr. Homans one-at-a-time as separate and distinct "private" transactions subject, in many cases, to individual negotiations where a purchase or exchange was involved.

The transactions that caused Mr. Homans to be named a defendant in the suit did not begin until eleven months after the corporation had transferred exclusive responsibility for

securities law services to its special securities counsel, Edward Gedalecia, and transferred the corporate records from Mr. Homans' office to Gedalecia's office. Gedalecia was retained on October 16, 1967. During all of 1968, Homans did not send a single transaction to the transfer agent that did not involve a recipient who was a bona fide corporate officer, director or close family member or associate of such a person. During 1969, there were only 24 transactions covered by Form 2 letters from Homans and involving recipients not personally known to Homans. They were widely separated, and each was described to Homans as a separate "private" transaction. During 1970, there were 34 such transactions involving recipients Homans did not have specific knowledge about. During 1971, there were 19 such transactions. In 1972, there was one. Thereafter, there were none. During 1967 and 1968 there were none.

Mr. Homans argued below (1) that the Commission had, in the first instance, a duty to define for the court and to prove one or more "integrated offerings" involved in this suit and (2) that it failed to meet that burden. (Post-Trial Memorandum dated 8/22/74, Point I, pp.57-63) It is perfectly clear from the record, that if the Commission had such a burden

it failed to meet the required standard in its proof. The district court reached no conclusion to the contrary. Moreover, the Commission did not even respond to that argument in its brief.

What the district court did was to conclude in a footnote to its opinion (Note 30) that the S.E.C. had no burden in this case of proving at least one "integrated offering" because the concept of an "integrated offering" applies only to cases involving the intrastate offering exemption of Section 3(a)(11). It implicitly conceded, as did the Commission, that, if such a burden existed, it was not satisfied.

The district court's conclusion in this connection is directly contrary to that reached by Professor Loss in his authoritative treatise. I Loss, Securities Regulation (2d ed. 1961) pp. 578, 591-595, 615-619 (re integration of so-called Regulation A exemption transactions), 642-643 (re integration of transfers by persons other than issuers, underwriters and dealers exempted under Section 4(1)), 674-676 (re integration of exempt private placement transactions involving convertible securities), 687-689 (re integration of issues under the so-called "private offering" exemption of Section 4(2)). See also, Value Line, Inc. v. Marcus, CCH Fed. Sec. L. Rep., 64-66 Decisions, Par. 91,523, pp. 94, 969-971 (S.D. N.Y. 1965)

where a series of separate securities offers and sales were held not to be "integrated" because they were not made by the same persons, not part of a single plan of financing, involved different classes of securities, not made at the same time, not made for the same consideration, and not made for the same general purpose.

The S.E.C. itself has set forth a definition of when an "offering ... is an integrated part of an offering, previously made or proposed to be made" Securities Act Release No. 4434 (12-6-61). The determination is said to depend "essentially upon whether the offering or offerings are a related part of a plan or program." "Any one or more of the following factors may be determinative of the question of integration": (1) were the offerings "part of a single plan of financing"; (2) did they involve the same class of security; (3) were they made at or about the same time; (4) was the same type of consideration received in all of them; and (5) were they all made for the same general purpose.

Applying these criteria to the facts of the present case, it is quite clear that there was no proof in the present case of one or more "integrated" offerings covered by the

statute and substantially aided and abetted by letters from Mr. Homans. Reading the discussion by Professor Loss and the other authorities cited above, it becomes readily apparent that the concept of "integrated offering" is not limited in its application under the securities laws to intrastate exemption situations.

Since the Commission failed to prove that there was an integrated "offering" in this case regulated by the Securities Act, the finding in its favor below must be reversed and the case remanded with instructions to dismiss. Homans also argued below that, if an "offering" had been proved, there had been no proof that the particular offering in question (as distinguished from some other one) was "public" and the burden on the issue of "public" versus "private" is on the Commission, where the defendant is not the "issuer". But that is a different question entirely. The point made here, and we think persuasively, is that the S.E.C. had the burden of proving an integrated offering below and it failed to carry that burden.

CONCLUSION

FOR THE REASONS SET FORTH ABOVE THE
JUDGMENT BELOW SHOULD BE REVERSED.

Respectfully Submitted,

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APPENDIX TO BRIEF

EXTRACTS FROM SECURITIES ACT OF 1933 AS AMENDED

Section 3. (a) Except as hereinafter expressly provided, the provisions of this title shall not apply to any of the following classes of securities:

- (9) Any security exchanged by the issuer with its existing security holders exclusively where no commission or other remuneration is paid or given directly or indirectly for soliciting such exchange.

Section 4. The provisions of section 5 shall not apply to --

- (1) transactions by any person other than an issuer, underwriter, or dealer.
- (2) transactions by an issuer not involving any public offering.

Section 5. (a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly --

- (1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell such security

through the use or medium of any prospectus or otherwise; or

- (2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

- (c) It shall be unlawful for any person, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to offer to sell or offer to buy through the use of medium of any prospectus or otherwise any security, unless a registration statement has been filed as to such security, or while the registration statement is the subject of a refusal order or stop order or (prior to the effective date of the registration statement) any public proceeding or examination under section 8.

Section 20.

(b) Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this title, or of any rule or regulation prescribed under authority thereof, it may in its discretion, bring an action in any district court of the United States, United States court of any Territory, or the United States District Court for the District of Columbia to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices to the Attorney General who may, in his discretion, institute the necessary criminal proceedings under this title. Any such criminal proceeding may be brought either in the district wherein the transmittal of the prospectus or security complained of begins, or in the district wherein such prospectus or security is received.

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Julio VALLEJO, JR, being duly sworn,
deposes and says that deponent is not a party to the action,
is over 18 years of age and resides at 2742 PITKIN AVE
BROOKLYN NEW YORK 11208.

That on the 12th day of July, 1976
deponent personally served the within Brief of Defendant-Appellant
upon the attorneys designated below who represent the
indicated parties in this action and at the addresses below
stated which are those that have been designated by said
attorneys for that purpose.

By leaving 2 true copies of same with a duly
authorized person at their designated office.

By depositing true copies of same enclosed
in a postpaid properly addressed wrapper, in the post office
or official depository under the ~~exclusive~~ care and custody
of the United States post office department within the State
of New York.

Names of attorneys served, together with the names
of the clients represented and the attorneys' designated
addresses.

William J. Moran
Regional Administrator
Attorney for Plaintiff-Appellee
26 Federal Plaza
New York, N.Y. 10007

Sworn to before me this

12th day of July, 1976

Julio Vallejo, JR
LORRAINE L. FEXAS
Notary Public, State of New York
No. 41-1205620
Qualified in Kings County

Commission Expires March 30, 1976

Lorraine L. Fexas